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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE, CALIFORNIA

SHI'A ASSOCIATION OF THE BAY AREA;  
DR. NABI RAZA MIR; SYEDA ZAHERA;  
AHMED MIR; ALI MIR,

Plaintiffs,

vs.

MICHAEL CHERTOFF, Secretary,  
Department of Homeland Security;

ALBERTO GONZALES, Attorney  
General, United States;

EMILIO GONZALEZ, Director, United  
States Citizenship & Immigration  
Services;

CHRISTINA POULOS, Director,  
California Service Center;

GERARD HEINAUER, Director,  
Nebraska  
Service Center,

Defendants.

No. \_\_\_\_\_

C07 03328 JW  
PVT

Plaintiffs' Memorandum  
of Points and Authorities  
in Support of Ex Parte  
Application for a Temporary  
Restraining Order and  
Order to Show Cause Re:  
Preliminary Injunction;  
[Proposed] Order

Date:  
Time:  
Courtroom:

Plaintiffs' Memorandum of Points and Authorities  
in Support of Ex Parte Application for TRO

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**I. INTRODUCTION**

Plaintiffs, Shi'a Association of the Bay Area ("SABA"), Dr. Nabi Raza Mir ("Dr. Mir"), his wife, Ms. Syeda Zahera ("Ms. Zahera"), and their two older sons, Ahmed Mir, and Ali Mir, submit this memorandum of points and authorities in support of their application, pursuant to Fed. R. Civ. P. 65, for a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction restraining Defendants, Michael Chertoff, Secretary of the Department of Homeland Security ("DHS"), et al. (collectively "the Government"), from (1) further calculating Plaintiffs' continued presence in the United States towards the number of days they have accrued "unlawful status" or "unlawful presence," under Immigration and Nationality Act ("INA") §§ 245(k)(2)(A), 212(a)(9)(B), 8 U.S.C. §§ 1255(k)(2)(A), 1182(a)(9)(B); and (2) calculating any time Dr. Mir continues to work as a minister for SABA towards the calculation of a period of unauthorized employment under INA § 245(k)(2)(B), 8 U.S.C. § 1255(k)(2)(B).

Plaintiff Dr. Nabi Raza Mir ("Dr. Mir") has served as the Minister<sup>1</sup> of the Shi'a Association of the Bay Area ("SABA") since

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<sup>1</sup> Due to the lack of an equivalent English nomenclature for a Shi'a cleric, Dr. Mir is referred to with various titles,

1 January of 2002. SABA is a prestigious Shi'a Muslim community  
2 institution and place of worship serving over 200 families in  
3 the Bay Area. Dr. Mir, his wife, and two older children are  
4 nationals of India, who maintained valid non-immigrant religious  
5 worker status (R-1 and R-2 visas) until their status expired on  
6 January 1, 2007. On April 11, 2005, nearly two years before  
7 their non-immigrant status was to expire, SABA filed an I-360  
8 petition for Dr. Mir to immigrate as a "special religious  
9 worker." The approval of the petition would allow Dr. Mir to  
10 continue to serve as SABA's minister, and would permit Dr. Mir  
11 and his family to qualify for permanent residence in the United  
12 States.  
13

14  
15 Following a lengthy delay in the government's adjudication  
16 of SABA's petition, and nearing the date of expiration of their  
17 Minister's visa, SABA sought mandatory relief in United States  
18 District Court, in the Northern District of California, on  
19 September 8, 2006. In its complaint with the District Court,  
20 SABA sought prompt adjudication of the I-360 by the Department  
21 of Homeland Security ("DHS"). In a joint stipulation, DHS  
22 agreed to adjudicate SABA's petition for Dr. Mir before December  
23 29, 2006.  
24

25  
26  
27 including Minister, Resident Aalim, imam, priest, and Director  
of Religious Affairs.

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1 Subsequently, DHS sent a 19-point Request for Evidence  
2 ("RFE") to SABA, in which it required SABA and Dr. Mir to submit  
3 additional documentation and explanations by December 18, 2006.  
4 SABA timely provided voluminous and detailed responses to the  
5 RFE. However, on December 29, 2006 DHS denied SABA's I-360  
6 petition for their Minister of five years.  
7

8 SABA immediately filed an administrative appeal of the  
9 decision to the Administrative Appeals Office ("AAO"). Then, on  
10 May 29, 2007, SABA filed a new I-360 petition for Dr. Mir, based  
11 on a new qualifying period, and provided additional  
12 documentation addressing the concerns that DHS had raised in its  
13 last RFE. Concurrently with the second I-360 petition, Dr. Mir,  
14 his wife, and two older children filed I-485 applications for  
15 adjustment of status to permanent residence and accompanying  
16 applications for interim employment authorization.<sup>2</sup> However, DHS  
17 unlawfully rejected the adjustment of status and work  
18 authorization applications on June 6, 2007. Counsel received  
19 the rejected applications on June 20, 2007.  
20  
21

22 <sup>2</sup> Under INA § 245(a), 8 U.S.C. § 1255(a), a non-citizen who is in  
23 the United States pursuant to a legal entry, has a visa  
24 available, and is "admissible," may adjust his or her status to  
25 that of a permanent resident in the United States, rather than  
26 having to consular process through a U.S. Embassy abroad. To  
27 apply for "adjustment of status," the applicant files form I-485  
28 with USCIS. By operation of regulation, while the I-485 is  
pending with USCIS, the alien is considered to be in a period of

1 On June 14, 2007, DHS's denial of the first I-360 petition  
2 was vacated by the AAO and remanded to the District Director of  
3 the California Service Center -- who is responsible for the  
4 adjudication of the first religious worker petition filed by  
5 SABA on behalf of Dr. Mir -- primarily because the petition had  
6 been denied on grounds that were never raised in DHS's 19-point  
7 RFE.  
8

9 As a result of the government's previous delay of almost 2  
10 years, and its subsequent refusal to accept concurrently-filed  
11 I-485 applications, Dr. Mir and his family are at imminent risk  
12 of accruing over 180 days of "unlawful presence," which would  
13 bar them from adjustment of status under INA § 245(k)(2)(A), 8  
14 U.S.C. § 1255(k), and make them ineligible for re-entry to the  
15 United States for 3 to 10 years under INA § 212(a)(9)(B), 8  
16 U.S.C. § 1182(a)(9)(B). Furthermore, if SABA continues to employ  
17 Dr. Mir as its Minister, Dr. Mir will be barred from adjustment  
18 of status for engaging in unlawful employment for more than 180  
19 days. INA § 245(k)(2)(B), 8 U.S.C. § 1255(k)(2)(B). In order  
20 to prevent such irreparable harm, the Court should grant this  
21 request for a Temporary Restraining Order.  
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27 authorized stay and is entitled to work authorization. 8 C.F.R.

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## II. ARGUMENT

Temporary restraining orders are governed by the same standard applicable to preliminary injunctions. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n. 2 (1977); *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F.Supp.2d 1111, 1126 (E.D.Cal. 2001). A preliminary injunction will be granted upon a showing of either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) serious questions regarding the merits and that the balance of hardships tips sharply in favor of the moving party. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1158 (9th Cir. 2006); *Cadence Design Systems, Inc., v. Avant! Corp.*, 125 F.3d 824, 928 (9th Cir. 1997).

These two formulations "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155 (9th Cir. 2006). In considering a request for a temporary restraining order a court must remain mindful that such relief is aimed primarily at preserving the status quo pending a full hearing on a preliminary injunction. *Los Angeles Mem. Coliseum Comm'n v.*

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§ 274a.12(c)(9).

Plaintiffs' Memorandum of Points and Authorities  
in Support of Ex Parte Application for TRO

1 *National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980)  
2 ("fundamental principle" governing preliminary injunctive relief  
3 is the need to maintain the status quo prior to determination on  
4 the merits).

5 In this case, Plaintiffs have demonstrated serious  
6 questions on the merits, probable success on the merits,  
7 irreparable harm if this request is not granted, and that the  
8 balance of hardships sharply tips in their favor.  
9

10 **A. Plaintiffs have Demonstrated Serious Questions on the**  
11 **Merits and Probable Success on the Merits.**

12 Plaintiffs' Complaint raises serious legal questions  
13 regarding the Government's disparate treatment of religious  
14 workers, which violates Plaintiffs' Constitutional right to  
15 equal protection under the law. While the INA does not  
16 differentiate between a religious and non-religious worker's  
17 right to file an application for adjustment of status  
18 concurrently with the employer's visa petition, the agency  
19 regulations do not allow religious workers to file concurrently.  
20 8 C.F.R. § 245.2(a)(2)(B).  
21

22 Such disparate treatment undoubtedly raises a colorable  
23 claim under the Equal Protection Clause of the Constitution,  
24 since it results in religious workers being barred from  
25 employment authorization and permission to travel while the I-  
26 360 petition for them is pending, and results in the accrual of  
27

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1 unlawful presence in cases, like Dr. Mir's, where adjudication  
2 of the I-360 is delayed.

3       Additionally, Plaintiffs' Complaint raises serious claims  
4 under the First Amendment, as Plaintiff SABA is at imminent risk  
5 of losing its Minister, and its ability to offer religious  
6 services and guidance to 200 Shi'a Muslim families, thus  
7 violating their Constitutional right to free exercise of  
8 religion. Finally the Complaint raises a Procedural Due Process  
9 claim due to unnecessary government delay, which has put  
10 Plaintiffs in the legally vulnerable position they are in today.

11       The Plaintiffs are also likely to succeed on the merits.  
12  
13 On February 23, 2007 the United States District Court for the  
14 Western District of Washington found that the Government's  
15 policy to accept concurrent filings for non-religious workers  
16 but to refuse concurrent filings for religious workers under 8  
17 C.F.R. §235.2a)(2)(i)(B), "violates the Equal Protection  
18 component of the Due Process Clause of the Fifth Amendment of  
19 the United States Constitution." *Hillcrest Baptist Church v.*  
20 *USA*, C06-1042 TSZ (W.D.Was 2007). The Court thus found that the  
21 Government's refusal to accept the applications violated the  
22 Plaintiffs' constitutional rights. *Id.*

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1 **B. Plaintiffs Will Suffer Irreparable Injury if the Government**  
2 **is not Enjoined.**

3 If the Government is not 1) enjoined from calculating  
4 Plaintiffs' unlawful presence and from finding that Dr. Mir  
5 engaged in work without authorization; or, alternatively, 2)  
6 compelled to accept Plaintiffs' I-485 applications as filed on  
7 June 1, 2007, Dr. Mir and his wife will fall out of lawful  
8 status and become ineligible to adjust their status to that of  
9 lawful permanent residence in the United States. Dr. Mir and  
10 his family would then have to return to India in order to obtain  
11 an immigrant visa that would allow him to work as the Minister  
12 for SABA. However, upon their departure from the United States  
13 they would incur a penalty under INA § 212(a)(9)(B), 8 U.S.C. §  
14 1182(a)(9)(B), and they would not be allowed to return to the  
15 United States for three or ten years, depending on the amount of  
16 unlawful presence accrued at the time of their departure.  
17

18  
19 The Plaintiffs will also suffer the irreparable injury of  
20 the violation of their constitutional rights to equal protection  
21 under the law, due process, and the free exercise of religion.  
22 The regulations' disparate treatment of religious and non-  
23 religious workers has an unequal and unjust effect on religious  
24 workers such as Dr. Mir. The regulations make a distinction  
25 between religious workers and non-religious workers, which the  
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1 statute does not make. The regulation's disparate treatment of  
2 religious workers is *ultra vires* and "bears [no] fair  
3 relationship to a legitimate public purpose." *Plyler v. Doe*,  
4 457 U.S. 202, 216 (1982).

5 Plaintiff SABA will further suffer irreparable injury if  
6 Dr. Mir is unable to continue to serve his congregation while  
7 his I-360 is adjudicated. If Dr. Mir is not permitted to accept  
8 employment, he will be unable to facilitate the practice of the  
9 Shi'a Muslim religion for SABA's members. SABA's and its  
10 congregants' First Amendment Right to the free exercise of  
11 religion will be violated, and the accumulation of Dr. Mir's  
12 unlawful presence will prevent SABA from having their minister  
13 for at least three years.  
14

15 Because of Dr. Mir's close relationship with the  
16 congregation and the fact that equally qualified applicants  
17 would likely need to be immigrated from abroad, it would be very  
18 difficult to replace Dr. Mir. The violation of a First Amendment  
19 right always constitutes irreparable injury. *Elrod v. Burns*, 427  
20 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for  
21 even minimal periods of time, unquestionably constitutes  
22 irreparable injury."); *Warsoldier v. Woodford*, 418 F.3d 989 (9th  
23 Cir. 2005) ("Under the law of this circuit, a party seeking  
24 preliminary injunctive relief in a First Amendment context can  
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1 establish irreparable injury sufficient to merit the grant of  
2 relief by demonstrating the existence of a colorable First  
3 Amendment claim.'"), quoting *Sammartano v. First Judicial Court*,  
4 303 F.3d, 959, 973-74 (9th Cir. 2002).

5 **C. The Balance of Hardships Tips Sharply in Favor of**  
6 **Plaintiffs.**

7 Should this motion not be granted, Plaintiffs are at risk  
8 of irreparable harm — a Congregation's loss of their Minister, a  
9 family's loss of the opportunity to remain in the United States,  
10 and a learned scholar's ability to continue serving the  
11 community to which he has dedicated the last five years. Should  
12 the motion be granted, on the other hand, the hardship to the  
13 Government is minimal. Ultimately, the Plaintiffs are merely  
14 seeking the fair adjudication of their applications and  
15 temporary relief from the prejudicial effects of the  
16 Government's unreasonable delay in adjudicating their petitions  
17 and the illegal and unconstitutional rejection of their  
18 adjustment of status applications.  
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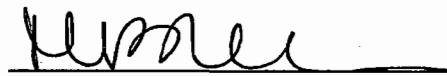
21 **III. CONCLUSION**

22 Based upon the foregoing, Plaintiffs respectfully request  
23 that their Ex Parte Application for Temporary Restraining Order,  
24 and Order to Show Cause Re: Preliminary Injunction as to  
25 Defendants be granted.  
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1 Dated: July 25, 2007

Respectfully Submitted,

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4 

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
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SHI'A ASSOCIATION OF THE BAY AREA;  
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ALBERTO GONZALES, Attorney General,  
United States;

EMILIO GONZALEZ, Director, United  
States Citizenship & Immigration  
Services;

CHRISTINA POULOS, Director,  
California Service Center;

GERARD HEINAUER, Director, Nebraska  
Service Center,

Defendants.

No. \_\_\_\_\_

[Proposed] Temporary  
Restraining Order and Order  
to Show Cause re: Preliminary  
Injunction

Date:

Time:

Courtroom: \_\_\_\_\_

1 After considering the moving papers filed in this action, the  
2 Court finds:

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4 (1) that this is a proper case for issuance of an order to show  
5 cause; and  
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7  
8 (2) that, unless the Court issues a temporary restraining order,  
9 Plaintiffs will suffer irreparable injury before the matter can  
10 be heard on formal notice.  
11

12 **IT IS ORDERED that:**  
13

14  
15 1. Defendants appear before this Court on \_\_\_\_\_, at \_\_\_\_\_,  
16 to show cause why a preliminary injunction should not be issued,  
17 enjoining them from calculating Plaintiffs' continued presence  
18 in the United States towards their "unlawful presence" or their  
19 periods of unauthorized employment in the United States.  
20

21  
22 2. Pending the hearing on the order to show cause, Defendants,  
23 their agents, officers, employees, and representatives, and all  
24 persons acting in concert or participating with them, be  
25 enjoined from calculating Plaintiffs' continued stay in the  
26 United States towards their "unlawful status," periods of  
27 unauthorized employment, or "unlawful presence" pursuant to INA  
28

1 §§ 245(k) and 212(a)(9), 8 U.S.C. §§ 1255(k), 1182(a)(9).

2  
3 3. A copy of the complaint, declaration(s), and memorandum of  
4 points and authorities, together with a copy of this order to  
5 show cause and temporary restraining order, be served on  
6 defendant no later than \_\_\_\_\_.  
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8  
9 **SO ORDERED.**

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12 DATE: \_\_\_\_\_

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14 UNITED STATES DISTRICT JUDGE  
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